STATE OF MICHIGAN

COURT OF APPEALS

CONTRACT SUPPLY COMPANY, INC.,

Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,

v

ADCO STRATFORD VILLAGE NORTH, CHARTER ONE BANK, N.A. AND ADCO GROUP L.L.C.,

Defendants-Appellees,

and

LEHMAN BROTHERS BANK, FSB,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
May 11, 2010

No. 289172
Macomb Circuit Court
LC No. 289172

Before: BORRELLO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Lehman Brothers Bank, FSB ("Lehman") appeals as of right a grant of summary disposition in favor of Contract Supply Company, Inc. ("CSCI") and its lien of $262,453.60 against a property for which Lehman holds the mortgage by assignment. In its cross-appeal, CSCI appeals the trial court's denial of interest on the judgment of foreclosure entered subsequent to the grant of summary deposition. We affirm the grant of summary disposition and the denial of interest on the judgment.

I. FACTUAL BACKGROUND

Adco Straford Village North, LLC ("ADCO") was the developer and owner of a certain condominium project located in Sterling Heights. The initial plan called for three phases (Phases I-III). ADCO obtained a purchase money loan from Lehman's predecessor in interest, Charter One Bank ("Charter One"), in the amount of $2.5 million along with a subsequent $3.2 million line of credit in June 2002. This indebtedness was secured by a mortgage on Phases I-III, which was recorded on August 15, 2002. In November 2003, ADCO obtained site approval for Phase

IV of the development and borrowed an additional $787,000 from Charter One, as evidenced by a November 18, 2003 mortgage, which was recorded on December 1, 2003. Another contractor began work on Phase IV in December 2003. Charter One and ADCO entered into a modification agreement, recorded on November 1, 2004, that rendered the earlier loan a second mortgage on Phase IV subordinate only to the $787,000 mortgage. Pursuant to an April 5, 2004 contract with ADCO, CSCI began working on Phase IV on December 10, 2004 and last provided material on August 19, 2005. A Notice of Commencement, which included a metes and bounds description of Phase IV, was issued by ADCO and recorded on April 12, 2004. The master deed that created the individual condominium units in Phase IV was recorded on January 19, 2005. CSCI filed a lien on November 7, 2005, which included a metes and bounds description of the realty included in Phase IV. CSCI filed suit against ADCO on March 22, 2006. The complaint was amended in September 2006 to seek foreclosure of its lien. ADCO filed a counter-claim for breach of contract on the same day.

The case was combined on the docket of a single trial judge with a myriad of other claims arising out the development. The first order in that case that is significant to this appeal was the grant of summary disposition on the issue of priority entered in favor of CSCI against Charter One on August 2, 2007. Lehman acquired Charter One's interest by assignment in March 2007 and was deemed to be the real party in interest through an order entered on August 15, 2007. Charter One was dismissed on December 10, 2007. Subsequently, a judgment was entered against ADCO for unjust enrichment and breach of contract on December 17, 2007 in the amount of $262,453.60, plus 5% interest from August 19, 2005 until the entry of judgment, plus actual reasonable attorney fees. On July 23, 2008, the trial court granted summary disposition in favor of CSCI's prayer for foreclosure against Lehman. A judgment of foreclosure was entered on September 3, 2008 that disallowed interest on the lien amount.

The Court is asked in this appeal to determine if a lien filed under MCL 570.1301 must also conform to MCL 559.164 and whether interest should be allowed on the lien amount.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Coblenz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the cause of action. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Summary disposition is proper under MCR 2.116(C)(10) where the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblenz*, 475 Mich at 568. In evaluating a motion for summary disposition brought under this subsection, we consider affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* at 567-568. The existence of a disputed fact must be established by substantively admissible evidence, although the evidence need not be in admissible form. MCR 2.116(G)(6); *Maiden*, 461 Mich at 121. Furthermore, we also review the decision on interest de novo. *Farmers INS Exch v Titan Ins Co*, 251 Mich App 454, 460; 651 NW2d 428 (2002).

When CSCI filed its first motion for summary disposition, the issue of priority was contested on legal and factual grounds including whether a notice of furnishing was properly served. The factual issues have been abandoned on appeal and Lehman asks this court to resolve the legal question regarding the application of the Construction Lien Act and the Condominium Act to this case.

III. THE CSCI SUB-CONTRACTOR LIEN HAS SUBSTANTIALLY COMPLIED WITH THE PROVISIONS OF THE CONSTRUCTION LIEN ACT, IS NOT REQUIRED TO COMPLY WITH §64 OF THE CONDOMINIUM ACT AND IS LEGALLY ENFORCEABLE AGAINST ALL UNITS OWNED BY THE DEVELOPER AT THE TIME OF RECORDING.

Lehman argues that the trial court erred when it found that the lien was valid. The court ruled that "[t]he Construction Lien Act specifically addresses liens and would govern issues of compliance rather than the Condominium Act." The court further concluded that CSCI was entitled to summary disposition because it substantially complied with the requirements of the Construction Lien Act. Lehman asserts that the Condominium Act controls this matter and that summary disposition was improper because the Condominium Act does not allow for substantial compliance. In addressing that issue, this Court will examine several statues: § 111 of the Construction Lien Act, and § § 64 and 132 of the Condominium Act.

Lehman cites *Attorney General v Flint City Council*, 269 Mich App 209; 713 NW2d 782 (2005), in support of its position that § 64 of the Condominium Act and § 111 of the Construction Lien Act address the same subject and that § 64, being more specific, is the controlling statute on the form of construction liens in condominium projects. Lehman notes that unlike § 111 of the Construction Lien Act, § 64 of the Condominium Act does not allow for substantial compliance but demands full compliance to retain an instrument's validity. Writing about the purpose of the multiple provisions affecting title to condominiums, Lehman asserts that the notice purpose of the law would be frustrated if metes and bounds descriptions like those in the CSCI lien are upheld as valid.

CSCI takes the contrary position regarding which statute controls the form of construction liens associated with a condominium development. CSCI relies on *Brown Plumbing and Heating Inc v Homeowner Construction Lien Recovery Fund*, 442 Mich 179, 183; 500 NW2d 733(1993), for the principle that the Construction Lien Act is the seminal authority on construction liens. While CSCI acknowledges that § 132 of the Condominium Act limits the scope of liens in condominium projects, CSCI argues that § 132 is the only section of the Condominium Act that contains any such limitation and that § 64 of the Condominium Act has no impact on the present case. CSCI additionally points to the fact that many units sold by ADCO after the lien was recorded would be on notice of a cloud against title per MCL 600.2701. We agree.

The Construction Lien Act, pursuant to MCL 570.1301, is the source of all rights and responsibilities relative to construction liens. It reads in pertinent part

> Sec. 111. (1) Notwithstanding section 109 the right of a contractor, subcontractor, laborer, or supplier to a construction lien created by this act shall cease to exist unless, within 90 days after the lien claimant's last furnishing of labor or material

> for the improvement, pursuant to the lien claimant's contract, a claim of lien is recorded in the office of the register of deeds for each county where the real property to which the improvement was made is located. A claim of lien shall be valid only as to the real property described in the claim of lien and located within the county where the claim of lien has been recorded.

As our Supreme Court has recognized, the Construction Lien Act only requires substantial compliance. *Big L Corp v Courtland Const Co*, 482 Mich 1090, 757 NW2d 852 (2008). Lehman does not contest that CSCI's lien substantially complies with the Construction Lien Act. However, Lehman now asserts that because the lien in this case relates to a condominium development, it must also comply with § 64 of the Condominium Act, which provides:

> Sec. 64. Conveyances and other instruments affecting title to any condominium unit in a condominium project shall describe the same by reference to the condominium unit number of the condominium subdivision plan and the caption thereof, together with a reference to the liber and page of the county records in which the master deed is recorded. The conveyances and other instruments are recordable.

Unlike the construction lien act, § 64 of the Condominium Act does not permit substantial compliance. For the reasons stated below, we find that CSCI was not required to comply with § 64 of the Condominium Act and that the trial court properly determined that the Construction Lien Act controls.

The Condominium Act, at § 132, explicitly references § 111 of the Construction Lien Act. Specifically, the Condominium Act provides:

> Sec. 132. A construction lien otherwise arising under the construction lien act, 1980 PA 497, MCL 570.1101 to 570.1305, is subject to the following limitations:
>
> (a) Except as provided in this section, a construction lien for work performed upon a condominium unit or upon a limited common element may attach only to the condominium unit upon which the work was performed or to which the limited common element is appurtenant.
>
> (b) A construction lien for work authorized by the developer, residential builder, or principal contractor and performed upon the common elements may attach only to condominium units owned by the developer, residential builder, or principal contractor at the time of recording of the statement of account and lien.
>
> ***

As the parties each acknowledge, § 132 of the Condominium Act thus explicitly places a series of limitations on the operation of the Construction Lien Act. In arguing that a construction lien arising from a condominium development is subject to § 64 of the Condominium Act, Lehman is essentially asking this Court to hold that § 64, like § 132, places a limitation on the operation of the Construction Lien Act. We refrain from reaching such a holding. Had the legislature intended § 64 of the Condominium Act to control construction liens, it would have explicitly stated so, much like it did in § 132. An explicit statement of control is particularly

important because of the existence of the Construction Lien Act's language indicating that it controls *all* rights in relation to a construction lien. The language of § 64 of the Condominium Act provides this Court with no indication that the legislature intended it to supplant the clear requirements of the Construction Lien Act.

Furthermore, to the extent that Lehman argues that § 64 should control because it is more specific than the Construction Lien Act, we disagree. § 111 of the Construction Lien Act addresses the operation of a specific type of instrument: a construction lien. In contrast, § 64 of the Condominium Act addresses a general category of all "conveyances and other instruments affecting title to any condominium unit." While § 111 is a narrowly tailored provision, § 64 is essentially a catchall provision. Therefore, because the Construction Lien Act contains the more specific statutory scheme, it is controlling. *In re Estate of Kostin*, 278 Mich App 47, 57; 748 NW2d 583 (2008).

The Construction Lien Act sets forth the requisite form of contractors' liens. It specifically provides in § 111 that the lien must incorporate the legal description that appears in the Notice of Commencement. The description of the property in the Notice of Commencement filed by ADCO, Lehman's mortgagee, was a metes and bounds description of the entirety of Phase IV. CSCI was compelled by the Construction Lien Act to use that same description in its lien. While Lehman notes that other contractors used a description for their work that described particular units per § 64, it does not contest that its mortgagee used the metes and bounds description in its recorded Notice of Commencement, nor does Lehman argue that its predecessor in interest was ignorant of the form of the legal description that was used in either document. Additionally, Lehman fails to note any requirement in the Construction Lien Act or the Condominium Act that would require a subcontractor seeking payment for completed work to amend its claim of lien to conform to an after-filed master deed containing a legal description of individual units.

Lehman also asks the court to reject the lien under § 132 because the scope of the lien extends to property on which no work was done. Neither ADCO nor Lehman's predecessor in interest asserted any objection to that inclusion from 2004 until after suit was filed. The approved units, which were never constructed, were owned by ADCO when the contract was entered and have never been sold to any innocent third parties. Consequently, the lack of reference to specific condominium units carries no risk of detrimentally affecting a purchaser or prospective purchaser. The third building was never framed by CSCI. However, the developer, by including the third building in the property description in the Notice of Commencement, essentially offered that property as security for the work to be done by the contractors. Where neither the developer nor the mortgagor objected to the inclusion of the entirety of Phase IV, neither law nor equity compel us to reform the scope of the lien agreed to by the owner.

IV. THERE IS NO STATUTORY AUTHORITY FOR AN AWARD OF INTEREST IN THE JUDGEMENT OF FORECLOSURE.

The judgment entered against ADCO on December 17, 2007 included principal, interest and attorneys' fees. Subsequently, certain property owners entered in to a settlement for $60,000. The trial court credited this entire sum against the principal when it entered the judgment of foreclosure. CSCI claims that the trial court erred in refusing to grant interest on the lien amount when it entered its judgment of foreclosure.

CSCI relies on the fact that it gained a money judgment against the original debtor, ADCO, before the entry of the judgment of foreclosure. They acknowledge that there is no Michigan authority authorizing such interest payments on a foreclosure. However they urge us to adopt the logic of the Ohio Court of Appeals in *Shaker Savings Ass'n v Greenwood Village Inc*, 7 Ohio App 3d 141; 454 NE 2d 984 (1982), which allowed judgment interest on a construction lien foreclosure. They also urge the adoption of the analysis in *Blue Tee Corp v CDI Contractors, Inc*, 247 Neb 397; 529 NW2d 16 (1995). However compelling the logic of those courts may be, interest in Michigan is only allowed based upon a statute. *Dep't of Transportation v Schultz*, 201 Mich App 605, 610; 506 NW2d 904 (1993). There is no statutory authority for a grant of interest in this case. Therefore, relief is not warranted.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Stephen L. Borrello
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens